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No. 10-796

In The Supreme Court of the United States

STATE COMPENSATION INSURANCE FUND,

Petitioner,

v.

NANCY ZAMORA, Chapter 7 Trustee,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, STATE COMPENSATION INSURANCE FUND, BY THE DISTRICT ATTORNEYS OF THE COUNTIES OF ORANGE; LOS ANGELES; MARIN; SAN BERNARDINO; SANTA CLARA; SAN DIEGO; SAN FRANCISCO; SANTA CRUZ; CONTRA COSTA; VENTURA; SACRAMENTO; ALAMEDA; AND RIVERSIDE; CALIFORNIA DEPARTMENT OF INSURANCE AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA

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TABLE OF CONTENTS

Page

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, STATE COMPENSATION INSURANCE FUND, BY THE DISTRICT ATTORNEYS OF THE COUNTIES OF ORANGE; LOS ANGELES; MARIN; SAN BERNARDINO; SANTA CLARA; SAN DIEGO; SAN FRANCISCO; SANTA CRUZ; CONTRA COSTA; VENTURA; SACRAMENTO; ALAMEDA; AND RIVERSIDE; THE CALIFORNIA DEPARTMENT OF INSURANCE AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA 1

INTEREST OF *AMICI CURIAE* 2

SUMMARY OF ARGUMENT 4

ARGUMENT 7

I. SECTION 547(b) OF THE BANKRUPTCY CODE DOES NOT APPLY TO TRANSFERS OF PROPERTY TO SATISFY ORDERS FOR RESTITUTION IN CRIMINAL CASES 7

II. CONGRESS HAS MADE ITS INTENTION CLEAR THAT ORDERS TO PAY RESTITUTION TO VICTIMS OF A DEBTOR-DEFENDANT'S CRIMES ARE NOT DISCHARGEABLE IN BANKRUPTCY PROCEEDINGS 10

TABLE OF CONTENTS – Continued

Page

III. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS DIRECTLY INTERFERES WITH THE SENTENCING OF CRIMINAL DEFENDANTS IN THE STATE OF CALIFORNIA 14

A. SENTENCING JUDGES IN CALIFORNIA ARE REQUIRED TO ORDER CRIMINAL DEFENDANTS TO PAY FULL RESTITUTION TO THE VICTIMS OF THEIR OFFENSES AS PART OF ANY OTHER PUNISHMENT IMPOSED 14

B. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS MAY RESULT IN THE INABILITY OF A SENTENCING COURT TO RESENTENCE A CRIMINAL DEFENDANT WHO BENEFITS FROM ITS RULING 19

C. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS IS A SUBSTANTIAL INTERFERENCE WITH THE RIGHTS OF THE STATE OF CALIFORNIA TO IMPOSE APPROPRIATE SENTENCES FOR VIOLATING CALIFORNIA LAW 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES

Barash v. Public Finance Corporation, 658 F.2d 504 (7th Cir. 1981) 9

Bearden v. Georgia, 461 U.S. 660 (1983) 19

Hardenberg v. Virginia, 42 F.3d 986 (6th Cir. 1994) 13

In re Schwinn Bicycle Co., et al., 200 B.R. 980 (Bankr N.D. Ill. 1996) 9

Kelly v. Robinson, 479 U.S. 36 (1986) ... 4, 10, 11, 13, 22

Pennsylvania Department of Public Welfare, et al. v. Davenport, 495 U.S. 552 (1990) ..... *passim*

People v. Bauman, 176 Cal.App.3d 67 (1985) 16

People v. Bernal, 101 Cal.App.4th 155 (2002) 16

People v. Goulart, 224 Cal.App.3d 7 (1990) 16

People v. Hove, 76 Cal.App.4th 1266 (1999) 16

People v. Jennings, 128 Cal.App.4th 42 (2005) 16

Troff v. State of Utah, 329 B.R. 85 (Bankr. D. Utah 2005) 12, 13

Younger v. Harris, 401 U.S. 37 (1971) 22

STATUTES

11 U.S.C. § 523(a)(7) ..... *passim*

11 U.S.C. § 547 ..... 4, 14, 23

11 U.S.C. § 547(b) 5, 6, 7, 9, 18

TABLE OF AUTHORITIES – Continued

Page

11 U.S.C. § 701 ..... 8, 10

11 U.S.C. § 1328(a)(3) 12, 13

Cal. Const., art. 1, section 28(a) 3, 14

Cal. Insurance Code, section 11880(a) 18

Cal. Insurance Code, section 1871.4(a)(4) 18

Cal. Penal Code, section 513 ..... 3, 17

Cal. Penal Code, section 1202.4 3

Cal. Penal Code, section 1202.4(f) 15

Cal. Penal Code, section 1203.04(d) 16

Cal. Penal Code, section 1203.4 ..... 18, 20

COURT RULES

Supreme Court Rule 14(1)(a) .....

Supreme Court Rule 37.2(a) 1

Supreme Court Rule 37.4 1

Cal. Rules of Court, Rule 4.423(b)(5) 3, 17

OTHER AUTHORITIES

Crime Control Act of 1990, Pub.L.No. 101-647, 104 Stat. 4789 (1990) 12

H.R. Rep. No. 595, 95th Cong., 1st Sess. 178 (1977) 9

TABLE OF AUTHORITIES – Continued

Page

H.R. Rep. No. 681(1), 101st Cong., 2nd Sess. 165 (1990), reprinted in 8 1990 U.S.C.C.A.N. 6471 13

S. Rep. No. 434, 101st Cong., 2nd Sess. (1990), reprinted in 6 1990 U.S.C.C.A.N. 4065, 4071 ...13, 21

AMICI CURIAE BRIEF IN SUPPORT OF PETITIONER, STATE COMPENSATION INSURANCE FUND, BY THE DISTRICT ATTORNEYS OF THE COUNTIES OF ORANGE; LOS ANGELES; MARIN; SAN BERNARDINO; SANTA CLARA; SAN DIEGO; SAN FRANCISCO; SANTA CRUZ; CONTRA COSTA; VENTURA; SACRAMENTO; ALAMEDA; AND RIVERSIDE; THE CALIFORNIA DEPARTMENT OF INSURANCE AND THE CALIFORNIA DISTRICT ATTORNEYS ASSOCIATION ON BEHALF OF THE PEOPLE OF THE STATE OF CALIFORNIA

Amici Curiae, District Attorneys for the Counties of Orange, Los Angeles, Marin, San Bernardino, Santa Clara, San Diego, San Francisco, Santa Cruz, Contra Costa, Ventura, Sacramento, Alameda and Riverside, the California Department of Insurance, and the California District Attorneys Association, submit this brief for filing in support of the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit as the authorized law officers of the respective counties of the State of California, pursuant to Supreme Court Rules 37.2(a) and 37.4.[1]

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[1] Counsel of record for the parties received timely notice of Orange County District Attorney's Office's intent to file this *amici curiae* brief ten days before the due date in compliance with Supreme Court Rule 37.2(a).

INTEREST OF *AMICI CURIAE*

Amici Curiae, District Attorneys for the Counties of Orange, Los Angeles,[2] Marin, San Bernardino,[3] Santa Clara, San Diego, San Francisco, Santa Cruz, Contra Costa, Ventura,[4] Sacramento,[5] Alameda and Riverside,[6] are the executive officers in the State of California, charged with the prosecution of persons who commit crimes in their respective counties and seeking court ordered restitution for the victims of those crimes, have a compelling interest in protecting the rights of the People of the State of California and victims of crime in the State.

Each county representative prosecutes a large number of criminal cases each year and is required by law to seek court orders for criminal defendants to make full restitution to the victims of crimes in the

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[2] The Los Angeles County District Attorney's Office is the largest prosecutorial agency in both the State and the nation.

[3] San Bernardino County is the largest geographical county in the United States and is the fifth most populous county in the state.

[4] Ventura County is the twelfth largest county in the state. The District Attorney's office seeks restitution from defendants in court and employs victim advocates and a restitution specialist to assist victims in obtaining restitution in criminal cases.

[5] Sacramento County has a population of over 1.4 million people and files approximately 30,000 cases per year, a large number of which involve an issue of victim restitution.

[6] Riverside County is the eleventh largest county in the United States with a population of over 2.1 million.

State.[7] California courts impose orders for restitution to victims of crime committed as part of an overall sentencing scheme of criminal defendants for violations of California law. Cal. Const., art. 1, section 28(a). California law requires judges to order restitution in every criminal case in which the victim has suffered a loss as part of any sentence imposed. Cal. Penal Code, section 1202.4. However, if a defendant makes restitution before a sentencing court imposes a sentence, that fact may be considered as a circumstance in mitigation of his sentence (Cal. Rules of Court, Rule 4.423(b)(5)), and, in an embezzlement case, if restitution is made before the filing of an Information or Indictment, the law permits the trial court to mitigate a defendant's punishment for his crimes. Cal. Penal Code, section 513.

In the case before this Court, the Ninth Circuit has held that where a criminal defendant has shown proof that he has made restitution to the victims of his crime resulting in the trial judge imposing a sentence substantially less than would otherwise have been imposed, then files for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code within ninety days of such restitution payment to the court or its agent, the victim of such crime

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[7] As an example, California district attorneys offices reported that statewide for fiscal year 2009-2010, California courts ordered more than $120 million in criminal restitution for violations of workers' compensation fraud alone, and collected more than $73 million.

must return those funds to the trustee in bankruptcy as a "preference" under section 547[8] of the Code. The result is that the victim whose property was stolen or damaged by the criminal acts of a debtor-defendant is not made whole as required under California law, while the criminal defendant has received the benefit of a lesser sentence for his crimes.

Amici Curiae submits that the Ninth Circuit's interpretation of section 547 of the Bankruptcy Code is a severe intrusion on the rights of the State of California to punish criminals, is contrary to the Bankruptcy Code, the intent of Congress in enacting the Code and its "preference" provisions, and prior holdings of this Court.

SUMMARY OF ARGUMENT

This Court has previously held that orders for restitution imposed as a part of sentencing in a state criminal proceeding are nondischargeable under Chapter 7 of the Bankruptcy Code. This Court based its holding on section 523(a)(7),[9] which excepts from discharge any debt that is "a fine, penalty, or forfeiture payable to or for the benefit of a governmental unit, and is not compensation for actual pecuniary loss."[10] The Court later held that the exclusion from

[8] 11 U.S.C. § 547.

[9] 11 U.S.C. § 523(a)(7).

[10] *Kelly v. Robinson*, 479 U.S. 36, 50 (1986).

discharge provision did not apply to Chapter 13 bankruptcies.[11] It also held that section 523(a)(7) did not apply to Chapter 13 cases and the Court would not exempt criminal restitution from discharge unless Congress so directed. Thereafter, Congress immediately amended the Bankruptcy Code and made its intention clear that restitution to victims of crime in criminal cases should not be dischargeable in bankruptcy proceedings.

In the case before this Court, the Ninth Circuit has ruled that payments of restitution made to a sentencing court or its agent and remitted to the victim of a crime are subject to return to the trustee of a criminal defendant's bankruptcy estate as a "preference" under section 547(b) of the Bankruptcy Code. That section provides that where a debtor files for bankruptcy protection under Chapter 7 of the United States Bankruptcy Code, the trustee appointed by the bankruptcy court over the debtor's estate can set aside any transaction incurred by the debtor within ninety days of the filing for such relief. The Ninth Circuit's ruling was made in spite of section 547(b)(5). This section provides that the bankruptcy court trustee may avoid a transfer of property of the debtor-defendant only if the transfer was one that enabled the creditor to receive more than it would have received if the transfer had not been made, and

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[11] *Pennsylvania Department of Public Welfare, et al. v. Davenport*, 495 U.S. 552 (1990).

the debtor's estate was liquidated according to the provisions of the Bankruptcy Code. Since a debtor-defendant's order to make restitution to his victims is not dischargeable in a Chapter 7 bankruptcy proceeding, section 547(b)(5) does not permit the trustee to avoid the transfer.

Amici Curiae asserts that the ruling of the Ninth Circuit improperly interferes with the rights of the State of California to fashion and impose appropriate punishment in criminal cases as required under the laws of this state. By holding that payments made by criminal defendants on restitution orders are subject to return by the victims of crime to the debtor-defendant's bankruptcy estate, the Ninth Circuit has circumvented the intent of Congress in enacting the Bankruptcy Code and prior rulings of this Court. By allowing a debtor-defendant in a criminal proceeding to get the benefit of a lesser sentence, after making the victim of his crime whole, only to have the bankruptcy court order the return of such payments to the debtor-defendant's estate, frustrates the State's valid objective of punishment, deterrence, and rehabilitation of criminal defendants by ordering restitution in state criminal cases. In fact, such interference with the state's criminal justice system has the effect of creating a "loophole" for a criminal defendant to evade the imposition of an appropriate sentence by a sentencing court.

This Court has previously held that the Constitution protects the laws of the states from federal interference unless the contrary intent of Congress is

clear. In this case, Congress has clearly stated its intention that bankruptcy laws should *not* interfere with state criminal proceedings. The holding of the Ninth Circuit clearly negates the intent of Congress and patently interferes with the flexibility of state criminal judges to fashion legally mandated sentences.

For this reason, this Court should grant certiorari.

ARGUMENT

I. SECTION 547(b) OF THE BANKRUPTCY CODE DOES NOT APPLY TO TRANSFERS OF PROPERTY TO SATISFY ORDERS FOR RESTITUTION IN CRIMINAL CASES

Under the Bankruptcy Code preference avoidance provision of section 547(b),[12] a trustee appointed

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[12] 11 U.S.C. § 547(b) provides:

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property –

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made –

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the

(Continued on following page)

to administer the estate of a debtor may avoid and recover certain transfers made by the debtor to a creditor within the 90 days prior to filing for bankruptcy protection for the benefit of the debtor's estate. According to the legislative history of the provision:

> The purpose of the preference section is twofold. First, by permitting the trustee to avoid pre-bankruptcy transfers that occur within a short period before bankruptcy, creditors are discouraged from racing to the courthouse to dismember the debtor during his slide into bankruptcy. The protection thus afforded the debtor often enables him to work his way out of a difficult financial situation through cooperation with all of his creditors. Second, and more important, the preference provisions facilitate the prime bankruptcy policy of equality of distribution among the creditors of the debtor. Any creditor that received a greater payment than others of his class is thus required to disgorge so that all may

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> petition, if such creditor at the time of such transfer was an insider; and
>
> (5) that enable such creditor to receive more than such creditor would receive if –
>
> (A) the case were a case under chapter 7 of this title [11 USCS 701 et seq.];
>
> (B) the transfer had not been made; and
>
> (C) such creditor received payment of such debt to the extent provided by this title [11 USCS 101 et seq.].

> share equally. The operation of this preference section is to deter "the race of diligence" by creditors to dismember the debtor before bankruptcy, furthers the second goal of the preference section – that of equality of distribution.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 178 (1977); *In re Schwinn Bicycle Co., et al.*, 200 B.R. 980, 993 (Bankr N.D. Ill. 1996). Thus, payments that enable those transferees to receive more than they would have received in Chapter 7 liquidation may be avoided. *In re Schwinn Bicycle Co., et al.*, 200 B.R. 980, 987.

However, under section 547(b)(5), a trustee may avoid a transfer as a preference only if the trustee can show that the creditor improved his position against other creditors of the same class of claims when he received such payment. *In re Schwinn Bicycle Co., et al.*, 200 B.R. 980, 987; *Barash v. Public Finance Corporation*, 658 F.2d 504, 509 (7th Cir. 1981). Section 547(b)(5) is directed at transfers which enable creditors to receive more than they would have received had the estate been liquidated and the transfer not avoided. In other words, for there to have been a voidable preference, "the questioned transfer must have enabled the creditor to recover more than it would otherwise have been entitled to had the transfer not been made and had the debtor's estate then been liquidated under Chapter 7 of the Bankruptcy Code." *In re Schwinn Bicycle Co., et al.*, 200 B.R. 980, 987.

As discussed below, *Amici Curiae* submit that criminal restitution orders to victims of a debtor-defendant's crimes are not dischargeable under Chapter 7 proceedings. Thus, the victim of a debtor-defendant cannot be in a better position to recover than it otherwise would have been entitled had the debtor-defendant not sought bankruptcy court protection. Therefore, the transfers cannot be subjected to preference actions by trustees of the estate of a criminal defendant who files for Chapter 7 bankruptcy protection.

II. CONGRESS HAS MADE ITS INTENTION CLEAR THAT ORDERS TO PAY RESTITUTION TO VICTIMS OF A DEBTOR-DEFENDANT'S CRIMES ARE NOT DISCHARGEABLE IN BANKRUPTCY PROCEEDINGS

As pointed out by Petitioner, in *Kelly v. Robinson*, 479 U.S. 36, 50 (1986), this Court held that restitution obligations imposed as a condition of probation in a state criminal action are nondischargeable in proceedings under Chapter 7 of the Bankruptcy Code. 11 U.S.C. § 701 et seq. This Court concluded that restitution orders fall within 11 U.S.C. § 523(a)(7)'s[13] exception to discharge provision, which

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[13] 11 U.S.C. § 523(a)(7) provides:

(a) A discharge under section 727, 1141, 1228(a), or 1328(b) of this title [11 U.S.C. 727, 1141, 1228(a),

(Continued on following page)

protects from discharge any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." *Kelly*, at p. 50.

Four years later, in *Pennsylvania Department of Public Welfare, et al. v. Davenport*, 495 U.S. 552 (1990), a case involving a Chapter 13 proceeding, this Court reaffirmed its holding in *Kelly*, noting that discharge of criminal restitution orders does not apply "'because criminal proceedings focus on the State's interest in rehabilitation and punishment,'" and that "'restitution orders imposed in such proceedings operate "'for the benefit of the State'" and not "'for . . . compensation' of the victims.'"" (*Davenport*, 495 U.S., at 558-559, citing *Kelly*, 479 U.S., at 53). The Court acknowledged that past bankruptcy practice formed the Court's conclusion that section 523(a)(7) "broadly applies to all penal sanctions, including criminal fines." (*Davenport*, *supra*, at p. 563).

However, the Court held that section 523(a)(7) did not apply to Chapter 13 cases. The Court stated

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1228(b), or 1328(b)] does not discharge an individual debtor from any debt –

* * *

(7) to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss, other than a tax penalty – . . .

* * *

that Congress had failed to extend the provisions of that section to Chapter 13 cases and noted that:

> Congress could well have concluded that maintaining criminal prosecutions during bankruptcy proceedings is essential to the functioning of government but that, in the context of Chapter 13, a debtor's interest in full and complete release of his obligation outweighs society's interest in collecting or enforcing restitution obligations outside the agreement reached in the Chapter 13 plan.

(*Davenport*, *supra*, at p. 561).

Shortly after this Court's *Davenport* decision, Congress enacted the Criminal Victims Protection Act of 1990 as part of the Crime Control Act of 1990, Pub.L.No. 101-647, 104 Stat. 4789 (1990). This legislation added 11 U.S.C. § 1328(a)(3), while expressly excepted from discharge in Chapter 13 cases those debts for "restitution included in a sentence on the debtor's conviction of a crime." *Troff v. Utah*, 329 B.R. 85 (Bankr. D. Utah 2005). The Senate Judiciary Committee Report that accompanied Senate Bill 1931 explained that:

> This amendment will have the effect of overruling the Supreme Court's recent decision in *Pennsylvania v. Davenport*, [citation omitted], which held that criminal restitution obligations are dischargeable debts under chapter 13 . . . Importantly, these provisions will *prevent Federal bankruptcy courts from invalidating the results of State criminal proceedings.*

S. Rep. No. 434, 101st Cong., 2nd Sess. 8 (1990), reprinted in 1990 U.S.C.C.A.N. 4065, 4071 (Emphasis added); *Troff v. Utah*, 329 B.R. 85, 91; *Hardenberg v. Virginia*, 42 F.3d 986, fn. 6 (6th Cir. 1994).

Likewise, the House Committee Report on the legislation explained that the amendment "responds to the May 29, 1990 [*Davenport*] decision, in which the Supreme Court of the United States ruled that criminal restitution debts are dischargeable upon completion of a Chapter 13 reorganization plan." H.R. Rep. No. 681(1), 101st Cong., 2nd Sess. 165 (1990), reprinted in 8 1990 U.S.C.C.A.N. 6471. The amendment was added to "[correct] this result by adding a new paragraph (3) to Section 1328(a) so that criminal restitution payments will be nondischargeable in Chapter 13." *Id.* According to the House of Representatives Report:

> Section 1902 is not intended to alter in any way the coverage of section 523(a)(7), as that paragraph has been interpreted in Kelly v. Robinson, 479 U.S. 36, 93 L.Ed. 2d 216, 107 S.Ct. 353 (1986), to make criminal restitution obligations nondischargeable in Chapter 7. As a result of the change made in adding section 1328(a)(3), *no debtor with criminal restitution obligations will be able to discharge them through* ***any*** *bankruptcy proceeding*.

(Emphasis added); *Troff v. Utah*, 329 B.R. 85, 91-92 (2005); *Hardenberg v. Virginia*, 42 F.3d 986, fn. 6 (6th Cir. 1994).

Thus, while this Court has yet to rule on the applicability of the Crime Victims Protection Act on section 547, Congress has made its intention clear that *Kelly* is the correct application of section 523(a)(7), and that court ordered restitution to victims of crime in criminal cases should not be dischargeable in bankruptcy proceedings.

III. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS DIRECTLY INTERFERES WITH THE SENTENCING OF CRIMINAL DEFENDANTS IN THE STATE OF CALIFORNIA

A. SENTENCING JUDGES IN CALIFORNIA ARE REQUIRED TO ORDER CRIMINAL DEFENDANTS TO PAY FULL RESTITUTION TO THE VICTIMS OF THEIR OFFENSES AS PART OF ANY OTHER PUNISHMENT IMPOSED

By ruling that a trustee of a criminal defendant's bankruptcy may recover court-ordered restitution payments made by a debtor-defendant to the victim of his crimes, the Ninth Circuit Court of Appeals permits bankruptcy courts to interfere with the sentencing scheme employed by the State of California in all criminal cases.

Specifically, Cal. Const., art. 1, section 28(a) provides:

> (a) The People of the State of California find and declare all of the following: . . .

> (3) The rights of victims pervade the criminal justice system. These rights include personally held and enforceable rights described in paragraphs (1) through (17) of subdivision (b). . . .
>
> (b) In order to preserve and protect a victim's rights to justice and due process, a victim shall be entitled to the following rights:
> . . .
>
> (13) To restitution
>
> (A) It is the unequivocal intention of the People of the State of California that all persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the person convicted of the crimes causing the losses they suffer.
>
> (B) Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss.

Cal. Penal Code, section 1202.4(f) reflects this state constitutional mandate, stating in pertinent part that:

> In every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount claimed by the victim or victims or other showing to the court.

The statutory command is that full restitution shall be ordered for the victims in an amount sufficient, "to *fully* reimburse the victim or victims, for every determined economic loss incurred as the result of the defendant's criminal conduct." *People v. Hove*, 76 Cal.App.4th 1266, 1270 (1999) (emphasis added). Furthermore, Cal. Penal Code, section 1203.04(d), mandates that where a defendant is ordered to pay restitution for stolen property, the restitution amount imposed shall equal either the replacement cost of like property or the actual cost of repairing the stolen property where repair is possible. *People v. Goulart*, 224 Cal.App.3d 7, 82, fn. 6 (1990).

In a criminal case in California, the purpose of restitution is that it serves two functions of rehabilitation of the offender and compensation to the victim (*People v. Cookson*, 54 Cal.3d 1091, 1097 (1991)). Restitution has therefore been interpreted to mean "reimbursement to the victims of crime for actual loss flowing from the charged offense or from related misconduct." *People v. Bauman*, 176 Cal.App.3d 67, 76 (1985).

The fact that a defendant settles any actual or potential *civil* liability by paying the victim less than full restitution does not relieve a California court from ordering the defendant to pay the victim the full amount that he is owed. This is true even if the victim signed a written release of all claims against the defendant. *People v. Jennings*, 128 Cal.App.4th 42, 51 (2005); *People v. Bernal*, 101 Cal.App.4th 155, 164 (2002). Thus, whether a victim whose property was ordered returned as a preference to the trustee in

a debtor-defendants' bankruptcy estate, can otherwise collect restitution from a debtor-defendant because the debt is nondischargeable as held by the Ninth Circuit, does not satisfy the State's mandate that sentencing courts "secure" restitution to the victims of a debtor-defendants' crimes.

At the same time, if a defendant makes restitution before a court imposes a sentence, that fact may be considered as a circumstance in mitigation of the sentence imposed by the court (Cal. Rules of Court, Rule 4.423(b)(5)),[14] and, in an embezzlement case, if made before the filing of an Information or Indictment, the trial court is permitted to mitigate a criminal defendant's punishment for his crimes. (Cal. Penal Code, section 513).[15] This means, as demonstrated in

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[14] Cal. Rules of Court, Rule 4.423 provides:

Circumstances in mitigation include factors relating to the crime and factors relating to the defendant . . .

(b) Factors relating to the defendant include that:

. . .

(5) The defendant made restitution to the victim; . . .

[15] Cal. Penal Code, section 513 provides:

Whenever, prior to an information laid before a magistrate, or an indictment found by a grand jury, charging the commission of embezzlement, the person accused voluntarily and actually restores or tenders restoration of the property alleged to have been embezzled, or any part thereof, such fact is not a ground of defense, but it authorizes the court to mitigate punishment, in its discretion.

this case,[16] that a debtor-defendant can make full restitution to the victim of his crimes and in exchange receive a lesser sentence from the sentencing judge.

However, as a result of the Ninth Circuit Court of Appeals ruling, neither the State nor the victim is made whole as required by California law while the debtor-defendant has received a substantial benefit from the sentencing court. As described below, the result may be that the sentencing court is powerless to resentence the defendant to one that is appropriate with his criminal conduct.

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[16] According to Petitioner, the records of the Los Angeles County Superior Court reflect debtor-defendant Jeffrey Silverman was charged with violating Cal. Insurance Code, sections 11880(a) (Insurance Fraud) and 1871.4(a)(4) as felonies on or about January 14, 2005. On or about March 17, 2005, the debtor-defendant entered a *nolo contendere* plea to violating Cal. Insurance Code, section 11880(a) as a misdemeanor after delivering restitution to the Los Angeles District Attorney's Office as agent for the sentencing court. The court then sentenced the debtor-defendant to a term of probation that included performing community service. The District Attorney's office then remitted the restitution to the victim-creditor Petitioner the next day. Debtor-defendant filed for Chapter 7 Bankruptcy Code protection on April 29, 2005, well within the passage of the required 90 days for preference actions. Upon his completion of his community service, debtor-defendant petitioned the sentencing court to have his guilty plea withdrawn and to have his case dismissed per Cal. Penal Code section 1203.4. The sentencing court granted his motion on or about December 12, 2006 and dismissed his criminal case. Respondent commenced its preference action pursuant to section 11 U.S.C. § 547(b) on or about April 7, 2007.

B. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS MAY RESULT IN THE INABILITY OF A SENTENCING COURT TO RE-SENTENCE A CRIMINAL DEFENDANT WHO BENEFITS FROM ITS RULING

The danger of the Ninth Circuit's ruling is that judges in the State of California may be prohibited from imposing any new corrective sentence of a criminal defendant who takes advantage of its ruling. This Court has previously held that state courts cannot constitutionally revoke probation for failure to pay a fine and make restitution without first determining the probationer's ability to pay. *Bearden v. Georgia*, 461 U.S. 660 (1983). A criminal defendant who has filed for bankruptcy court protection will likely rely upon his declared insolvency to avoid any further consideration of punishment by the sentencing court.

Furthermore, in California, once a criminal defendant has fulfilled the conditions of probation, including making restitution to his victim, he may petition the sentencing court and must be permitted to withdraw his guilty plea or conviction and have the Accusation or Information dismissed against him. After the sentencing court takes this action, the debtor-defendant is released from all penalties for the

offense for which he was convicted. Cal. Penal Code, section 1203.4.[17]

As the facts of this case before this Court demonstrate,[18] the Ninth Circuit's ruling means that a criminal defendant in California can make full restitution to the victims of his offenses, show a sentencing court that he has successfully completed probation, have his guilty plea or conviction set aside, then file for bankruptcy court protection and have the trustee in the bankruptcy action demand the return of the restitution received by the victim and the sentencing court may be powerless to re-sentence him.[19] The ruling of the Ninth Circuit therefore

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[17] Cal. Penal Code, section 1203.4 provides in pertinent part:-

> In any case in which a defendant has fulfilled the condition of probation for the entire period of probation, or has been discharged prior to the termination of the period of probation, on in any case in which a court, in its discretion and the interests of justice, determines that a defendant should be granted the relief available under this section, the defendant shall, at any time after the termination of the period of probation, . . . , be permitted by the court to withdraw his or her plea of guilty or plea of nolo contendere and enter a plea of not guilty; . . . , and in either case, the court shall thereupon dismiss the accusations or information against the defendant and except as noted below, he or she shall thereafter be released from all penalties and disabilities resulting from the offense of which he or she has been convicted, ...

[18] See fn. 16, above.

[19] See fn. 16, above.

clearly "invalidate[s] the results of State criminal proceedings," which is contrary to the intent of Congress.[20]

C. THE RULING OF THE NINTH CIRCUIT COURT OF APPEALS IS A SUBSTANTIAL INTERFERENCE WITH THE RIGHTS OF THE STATE OF CALIFORNIA TO IMPOSE APPROPRIATE SENTENCES FOR VIOLATING CALIFORNIA LAW

Because of the potential impact on sentences imposed in the State of California as described above, *Amici Curiae* submits that the ruling of the Ninth Circuit Court of Appeals is a substantial interference with a sentencing decision by a state court judge, and is an unwarranted intrusion by the federal courts into the State's sovereign power. This ruling effectively vacates a criminal sentence that has been entered in full accord with all substantive and procedural mandates of the Constitution.

Amici Curiae submit that Justice Blackmun best summarized the resulting harm in his dissent in *Davenport, supra* at p. 573:

> The judgment of sentencing courts and legislators that rehabilitation is the most effective form of punishment will be tempered by the knowledge that convicted criminals easily

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[20] S. Rep. No. 434, 101st Cong., 2nd Sess. 8 (1990), reprinted in 1990 U.S.C.C.A.N. 4065, 4071.

> may avoid [a] sentence requiring restitution merely by obtaining a discharge. Sentencing courts will be faced with a dilemma. The sentencing judge must either risk that a federal bankruptcy judge will undermine a restitution order, thus absolving the convicted criminal from punishment, or impose a harsher and less appropriate term of imprisonment, a sentence that the federal bankruptcy court will be unable to undermine. Congress surely would not have enacted legislation with such an extraordinary result without at least some discussion of its consequences.

This Court recognized in both *Kelly*[21] and *Davenport*[22] that permitting the discharge of criminal restitution obligations may hamper the flexibility of state criminal judges in fashioning appropriate sentences, and that the legitimate State interest in avoiding such intrusions is not lessened simply because the offender files under Chapter 13 rather than Chapter 7. Indeed, this Court noted in both cases "the fundamental policy against federal interference with state criminal prosecutions." *Younger v. Harris*, 401 U.S. 37, 46 (1971). By allowing the bankruptcy trustee to demand and recover funds paid by a debtor-defendant to the victims of his crimes as part

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[21] *Kelly v. Robinson*, 479 U.S. 36, 49.

[22] *Pennsylvania v. Davenport*, 495 U.S. 552, 564.

of his sentence in a criminal case, the holding of the Ninth Circuit violates that fundamental policy.

CONCLUSION

This Court has previously held that payments of restitution to the victims of a debtor-defendant's crimes in a Chapter 7 proceeding are not dischargeable. Since its holding, Congress has made its intention clear that restitution payments should not be dischargeable in any bankruptcy proceedings. While this Court has yet to rule on the applicability of its previous holdings and the Crime Victims Protection Act on section 547 of the Bankruptcy Code, the Ninth Circuit Court of Appeals has held that despite the exception to discharge created by Congress to debts that are not dischargeable in bankruptcy, the trustee of a debtor-defendant's estate can recover restitution payments made to victims of crime even though the debt is not dischargeable. This is a clear violation of the Bankruptcy Code, the intent of Congress in enacting the Code and its "preference" provisions, and prior holdings of this Court.

For this reason, *Amici Curiae* urges this Court to grant certiorari.

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Respectfully submitted,

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